RECORD AND BRIEFS

Supreme Court, U.S.
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No. 16-111

IN THE

Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD.;
AND JACK C. PHILLIPS,

Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION; CHARLIE CRAIG;
AND DAVID MULLINS,

Respondents.

On Writ of Certiorari to the Colorado Court of Appeals

BRIEF OF *AMICI CURIAE* THE CENTER FOR INQUIRY, THE SECULAR COALITION FOR AMERICA, AND AMERICAN ATHEISTS IN SUPPORT OF RESPONDENTS

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INTERESTS OF AMICI CURIAE[1]

The Center for Inquiry ("CFI"), the Secular Coalition for America ("SCA"), and American Atheists, Inc., submit this brief as amici curiae in support of respondents.

CFI is a nonprofit, educational organization dedicated to promoting a secular society based upon reason, science, freedom of inquiry, and humanist values. Through education, research, publishing, social services, and other activities, including litigation, CFI encourages evidence-based inquiry into science, pseudoscience, medicine and health, religion, and ethics. CFI believes that the separation of church and state is vital to the maintenance of a free society.

SCA is a national, nonprofit advocacy organization headquartered in Washington, D.C., dedicated to amplifying the diverse and growing voice of the nontheistic community in the United States. Representing eighteen voting member organizations and nearly three hundred local endorsing organizations, the mission of SCA is to increase the visibility of and respect for nontheistic viewpoints in the United States, and to protect and strengthen the secular character of our government as the best guarantee of freedom for all. SCA's interests in the defense of a strong wall of separation between church and state are impacted by

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[1] Parties to this case have given blanket consents to the filing of amicus briefs; their written consents are on file with the Clerk. Respondents Craig and Mullins have granted permission for the filing of this brief, and this consent has been filed with the Clerk's office. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than amici and their counsel made a monetary contribution to the preparation or submission of this brief.

religious based exemptions to anti-discrimination laws being recognized.

American Atheists, Inc. is a national educational nonpolitical, nonprofit corporation. American Atheists is a membership organization dedicated to advancing and promoting the complete and absolute separation of religion and government, and to preserving equal rights under the law for atheists. American Atheists encourages the development and public acceptance of a humane, ethical system that stresses the mutual sympathy, understanding, and interdependence of all people and the corresponding responsibility of each individual in relation to society.

SUMMARY OF ARGUMENT

Amici include representatives of the fastest growing religious demographic in the United States, the "nones" – those without religious belief or affiliation, including, among others, atheists, agnostics, and secular humanists. Central to amici's core mission is the belief that Thomas Jefferson's wall of separation of church and state benefits all of society; both believers and nonbelievers alike. Amici seek to defend not only the rights of all people to worship or not worship as they choose, but also to be free from state sponsored religious practices. By privileging the practice and values of religion in general over the values of the nonreligious, or by privileging those of one particular religion over others, the government not only violates the Establishment Clause of the First Amendment to the United States Constitution, but also undermines the free exercise of religion.

Petitioners ask this Court to place the government's imprimatur on their specific religious beliefs. Petitioners' true religious freedom – the right to believe and

worship as they choose – is not at stake here. Instead, petitioners seek a new "right," one which has no basis in any part of the First Amendment. They seek the right for a for-profit business to discriminate against other residents, in violation of state law. If this Court creates such a new right, it will fundamentally undermine not only anti-discrimination law, but also the careful balance drawn between the defense of private belief and society's right to require that for-profit businesses abide by non-discrimination laws.

Phillips is a baker who runs a for-profit business making baked goods including wedding cakes. He claims a right based on his religion to ignore the public accommodations section of Colorado's Anti-Discrimination Act ("CADA"), Colo. Rev. Stat. § 24-24-601(2) which protects members of the lesbian, gay, bisexual, and transgender ("LGBT") community from discrimination by private businesses. He refused to make and sell a wedding cake to an engaged couple for the sole reason that they were both men. Unable to found his claim of a right to discriminate in religious freedom, as Colorado has rejected attempts to pass a state Religious Freedom Restoration Act ("RFRA"), Phillips instead has sought to develop an argument which has never held water as the federal government and state governments have extended civil rights protections based on race, gender, religious viewpoint, and now sexual orientation and gender identity. He seeks to claim that his for-profit business is exercising its protected free speech rights when it refuses service to members of the LGBT community, and therefore anti-discrimination laws cannot be enforced against his bakery.

Petitioners' claim of a free speech right to refuse service to a protected minority has no basis in existing law. Amici believe that recognizing such a new right would impermissibly and uncontrollably extend the concept of expressive speech, allowing businesses throughout the economic sphere, including, but not limited to restauranteurs, bartenders, and hoteliers, to refuse service to protected classes. Moreover, Phillips admits that he had no knowledge of the design of this cake when he refused service. His objection, then, must be seen as a refusal to serve potential customers based on their sexual orientation alone, in direct violation of Colorado law, rather than as an objection based on the specific design and message sent by this particular cake.

Petitioners' claim, then, is essentially one of religious freedom, regardless of how Phillips has chosen to present it. In light of controlling Supreme Court precedent in *Employment Division v Smith*, 494 U.S. 872, 882 (1990), petitioners are not constitutionally entitled to an exemption from a law of general applicability that does not invidiously discriminate against religion. All for-profit businesses in Colorado are required to obey that state's anti-discrimination laws. Such laws do not target religion in any fashion. Phillips has no constitutional right to the exemption he claims. The popularly elected representatives of the people of Colorado have decided not to grant such an exemption to religious objectors.[2] This should end the matter.

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[2] Amici continue to maintain that such exemptions to generally applicable laws, including those granted under the federal Religious Freedom Restoration Act of 1993, 42 U.S.C.S. §2000bb-1, are unconstitutional violations of the Establishment Clause. However, for the purposes of this brief, amici choose not to argue

Phillips, however, seeks to justify his claim for a religious based exemption by advancing an argument based on "hybrid" rights. Amici note that such an argument could be made for any claim of a religious exemption, and would, if accepted, effectively overturn this Court's decision in *Smith*, 494 U.S. at 882.[3] Even if this Court were to recognize such an exemption, petitioners would not qualify for it. Preventing harm to the dignity of individual customers rejected for service under such an exemption is a compelling interest, and such an exemption would critically undermine this Court's series of decisions acknowledging the rights of the LGBT community. *See Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003); *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). By granting such an exemption, moreover, this Court would be permitting for-profit businesses, which have voluntarily entered into the stream of commerce in full knowledge of regulations governing such activity, to avoid complying with laws of general applicability, based solely on the religious faith of the individual owners of those businesses. The burden resulting from such exemptions would fall not on the government, such as in prior cases seeking exemptions like *Gonzales v. O Centro Espirita Beneficente Uniao de Vegetal*, 546 U.S. 418, 423 (2006). Instead this burden will fall directly on identifiable individuals, the members of

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that state and federal laws granting such exemptions are facially unconstitutional. Amici continue to argue, *infra*, that such exemptions which impose burdens on third parties are unconstitutional, and undermine the fundamental nature of the protections granted by the Establishment Clause.

[3] The failings of this "hybrid" rights claim are expounded in multiple briefs. In the interests of economy, amici do not intend to focus on this argument.

the LGBT community who are refused service. These individuals could no longer be made whole after this injury. Granting such an exemption would prioritize petitioners' personal religious beliefs, put into practice through the actions of a for-profit business, over and above the rights and interests of other members of society. This preference for religion violates the Establishment Clause.

ARGUMENT

I. PETITIONERS' FREE SPEECH ARGUMENT IS BOTH FACTUALLY FLAWED AND CANNOT BE CONFINED

A. Petitioners refuse to bake any custom wedding cake for any same sex couple

Jack C. Phillips is an owner of Masterpiece Cakeshop, Ltd., a for-profit corporation located in Colorado that sells a range of products, both premade and custom-designed, including wedding cakes. In July 2012, three potential customers, Charlie Craig, David Mullins, and Deborah Munn entered Masterpiece Cakeshop and told Phillips they were seeking a wedding cake for Craig and Mullins' wedding. Phillips informed them that he refused to design wedding cakes for same sex marriages because of his religious beliefs. As a result of this refusal, Phillips was found by an Administrative Law Judge to have violated the Colorado Anti-Discrimination Act. This ruling was upheld when Phillips appealed it to the Colorado Civil Rights Commission, which ordered petitioners to cease discriminating against customers entering same sex marriages. Phillips again appealed the ruling, and it was affirmed once more by the Colorado Court of Appeals. *Mullins v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 276 (Colo. App. 2015), *cert. denied*,

Masterpiece Cakeshop, Inc. v. Colo. Civ. Rights Comm'n., 2016 Colo. LEXIS 429 (Colo. Apr. 25, 2016), *cert. granted Masterpiece Cakeshop, Inc. v. Colo. Civ. Rights Comm'n.*, 137 S. Ct. 2290 (June 26, 2017).

Petitioners' claim that making a cake for a same sex marriage ceremony impermissibly compels Phillips (and the for-profit business owned by him and his wife) to speak in endorsement of same sex marriages fails on two grounds. First, Phillips, by his own admission, had no knowledge of the type of cake, or any ultimate message it would send, that he would be requested to design when he refused service to Craig and Mullins. (Brief of Petitioners at 10). He only knew that they were two men engaged to be married. *Id.* Second, any association with any message involved would be the result of voluntary actions undertaken for business reasons by Phillips.

The record indicates that Phillips rejected baking a custom wedding cake for Craig and Mullins because they were two men seeking to marry. Craig and Mullins were examining a book of photographs, and had not given Phillips any indication as to the design of the cake they would select. While petitioners point to the cake that the couple later had made for them by a baker who chose not to discriminate, "a rainbow-layered [wedding] cake," (Brief of Petitioners at 22), as an indication that a cake would have sent a message of support for same sex marriage, this information is irrelevant to Phillips' actions at the time of refusal. He did not yet know this. For all that Phillips knew at the time he refused to serve the couple, they could have been requesting merely a plain cake. Petitioners' claims that the artistic impression involved would communicate support for same sex marriage have no basis in the facts of the case.

Because petitioners knew nothing yet about the cake to be designed, except that it was for a same sex wedding, there can be no credible argument that the cake's design could, at the time of refusal, be held to send a particular message. Had petitioners refused service to Craig and Mullins after they had requested "a rainbow-layered [wedding] cake," then such a claim would differ from the present case.[4] Phillips did not, however, do this. Instead, he refused service based on nothing other than not wanting his cake, regardless of what that cake would look like and what message it would send, to be used in a same sex marriage celebration.

Realizing this, petitioners' seek to strengthen Phillips' personal association with the wedding cake by emphasizing that he not only "designs and hand-crafts the cake," but that he also "delivers it to the event," and "often interacts with the wedding guests." (Brief of Petitioners at 24) Once again, Phillips can make no claim to have known that he would either deliver the wedding cake or interact with Craig and Mullins' guests, as he did not, at the time of refusal of service, engage in any discussion with them regarding the cake, let alone their ceremony. Instead, he immediately denied them service upon discovering their plans to marry. Yet even if he had attended the wedding, such a decision would be Phillips' own choice. There is no requirement for Phillips to personally deliver the cake nor to mingle with guests. Those actions, when voluntarily undertaken, may benefit

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[4] Amici maintain that even under such a fact pattern, petitioners would still have no right to refuse service. Such a situation is not before this Court, and such a hypothetical situation need not be addressed.

Phillips' business and generate future profits.[5] Phillips, to a large extent, chooses the degree to which he is associated with a particular cake once ordered and made. Such a personal decision, made, as petitioners here admit, with the intention of generating future business, cannot form the basis of a claim that an individual and a business are compelled to endorse a particular message.

Phillips compares himself to a painter, or a sculptor, compelled to generate a work of art containing a message he opposes. His comparison, however, falls short. Petitioners were not asked to design a cake celebrating same sex marriage, or even Craig and Mullins' marriage. Phillips refused service without any knowledge of the ultimate design of the cake. As opposed to an artist or sculptor refusing a particular commission on the basis of opposition to a particular message, Phillips' actions are akin to a painter announcing "I do not do portraits of African Americans," or a sculptor categorically refusing to create statues of Jewish people. Petitioners had no knowledge of the message to be sent, and cannot now claim to have refused service to Craig and Mullins for any reason other than the intent to enter into a same sex marriage.

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[5] As petitioners note, "many who view Phillips' designs at a wedding later ask him to create a cake for them." (Brief of Petitioners at 24).

B. Under petitioners' theory, large swaths of business activity could be exempted from anti-discrimination laws as expressive speech

As noted *supra*, petitioners seek to identify themselves with artists such as sculptors and painters. Amici do not deny the work and skill involved in the design and the baking of a wedding cake. Phillips is, by all accounts, a very talented individual. However, granting petitioners' claim that a compelled message is being sent by requiring non-discrimination by a for-profit business cannot be restricted only to a particular segment of the business world – portrait painters, sculptors, and wedding cake bakers – yet denied to many other segments. If the very act of baking and selling a wedding cake to a couple (without any prior knowledge of the final design of that cake) indicates that the baker approves of and endorses that marriage, then large amounts of business activity in America would have to be classified as expressive actions, potentially allowing whole professions and occupations to refuse to obey non-discrimination laws.

One does not have to venture outside the world of wedding services to see how broad the impact of such a determination would be. Florists and wedding photographers have also sought, largely unsuccessfully, to be exempt from requirements to provide non-discriminatory services to same sex couples.[6] *E.g.*

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[6] Such suits have typically been based on a claim of religious freedom. However, the arguments are similar, and, indeed, would have been made by petitioners here had such a route been available. Further, Colorado's representatives have rejected creating a state RFRA, thereby indicating their determination that religious beliefs do not grant businesses, or individual

State v. Arlene's Flowers, Inc., 389 P. 3d 543 (Wash. 2017); *Telescope Media Grp. v. Lindsey*, 2017 U.S. Dist. LEXIS 153014 (D. Minn. Sept. 20, 2017). It would seem impossible to claim that the design and baking of a cake is inherently protected speech, even before the particular design was known, and yet deny such a status to the creation of bouquets and floral centerpieces. Such claims will not end at the wedding chapel gates or the reception hall doors.

Restauranteurs, and in particular chefs, use their artistic talent to create an ambience and often a thematic menu. Owners of "Bed and Breakfast" guest houses may advertise themselves as quaint getaways, and hotels may use their décor and design to create a modernistic theme. Bartenders, or "mixologists," express themselves through their cocktail creations. For each of these groups, the act of serving someone a meal, renting a room, or mixing a drink can be seen as sending approval of those customers or their lifestyles in precisely the same way that Phillips claims that baking a cake of not yet determined design would have expressed a message of approval for same sex marriage.

It is not only the hospitality industry where such invidious discrimination will occur. If anti-discrimination laws do not apply to petitioners because of their objection to same sex marriages, do they also not apply to hairdressers, who may assert that cutting the hair of a gay man is approving of his lifestyle? May morticians refuse to handle the corpse of a lesbian, so that such action will not be seen as an endorsement of her marriage? Can car mechanics refuse to repair the

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business people, the right to practice discrimination in a way that would violate an otherwise generally applicable law. *Infra* n.9.

brakes of a bisexual person, if those mechanics fear that by so doing they are expressing support for the driver's desire to travel to meet a same sex partner? Petitioners' claims cannot be confined. Granting an exemption here would create an expanded opportunity for businesses to refuse to obey anti-discrimination laws.

C. Petitioners' true argument is one of free exercise of religion

Petitioners' claims of free speech do not hold up under scrutiny. Where such objections to complying with neutral laws have occurred, they have typically been brought under the auspices of religious freedom, and, in particular, RFRA, or its state level equivalents. This Court has made clear that no right exists under the Free Exercise Clause to exemptions from laws of general applicability at either the federal or the state level. *Smith*, 494 U.S. at 882. If a law declares the use of peyote to be criminal, the First Amendment no more permits its use (or requires termination caused by its use to trigger the receipt of unemployment benefits) as part of a Native American religious ceremony than as part of an individual's preparation for listening to a Grateful Dead album. Where the right to exemptions from generally applicable laws based upon an individual's religious beliefs has been found, such as the ability to import hallucinogenic tea, it has been found only in exemptions provided under RFRA.[7] *Gonzales*, 546 U.S. at 423.

Such a legal strategy is not open to petitioners. This Court has found that RFRA does not control state

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[7] Amici maintain that granting religious exemptions to generally applicable laws serves only to privilege religion, and thus violates the Establishment Clause.

action. *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997). In response, some states passed laws, or amended their state constitutions, to provide similar exemptions based on religious belief under state law.[8] In Colorado, however, such a law was proposed but not passed.[9] Much of the concern regarding the proposed law was based on the possibility that it would permit private for-profit businesses, such as Masterpiece Cakeshop, to avoid the state's anti-discrimination and civil rights laws and thereby refuse service to those members of the public the state has decided to protect from such discrimination.[10]

Petitioners admit that Phillips' objection to providing a cake for Craig and Mullins' wedding reception was based on his religious beliefs. (Brief of Petitioners at 8-9). To attempt to carve out an exemption, they have sought to create a free speech claim where none otherwise exists. Realizing this, petitioners have tacked on a free exercise claim, seeking to bypass the clear holding of *Smith*, 494 U.S. at 882. Petitioners claim first that the law at issue here, the Colorado Anti-Discrimination Act, is not one of neutral applicability, but instead is in some way targeting Phillips and others whose religious beliefs oppose same sex marriage. This claim, however, has no relation to the template which this Court laid out in *Smith* itself, for a law which invidiously targets religion.

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[8] Don Byrd, *State RFRA Bill Tracker*, Baptist Joint Committee for Religious Liberty, http://bjconline.org/staterfratracker/ (last visited October 26, 2017).

[9] Brian Eason, *Religious Freedom Bill Dies in Colorado House*, Denver Post, January 25, 2017, http://www.denverpost.com/2017/01/25/religious-freedom-bill-dies-colorado-house/.

[10] *Id.*

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[10] *Id.*

> "It would be true, we think (though no case of ours has involved the point), that a State would be 'prohibiting the free exercise [of religion]' if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of 'statues that are to be used for worship purposes,' or to prohibit bowing down before a golden calf." *Id.* at 877-88.

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524 (1993), the Court struck down a local ordinance which purported to regulate animal sacrifice on a neutral basis. However, in effect, it only banned sacrifice practiced by adherents of the Santeria religion. *Id.* at 538 (finding "significant evidence of the ordinances' improper targeting of Santeria sacrifice.") No such evidence of invidious targeting exists here. Colorado has passed laws protecting its citizens from discrimination based upon sexual orientation. That these laws, according to petitioners, impact religious bakers who oppose same sex marriage more than those bakers who do not, does not establish any invidious targeting of religion. (Brief of Petitioners at 39-40). All laws "target" those who wish to break them more than such laws "target" those who do not wish to do so. The prohibition on peyote at issue in *Smith*, 494 U.S. at 890, certainly impacted Native Americans whose religion involved the use of peyote more than, for example, Mormons who eschew intoxicants of all kinds. That does not by any means establish that a prohibition on the use of peyote, which applies to all citizens, intentionally discriminates against Native American religions. Thus a law which prohibits any for-profit business from discriminating

based on sexual orientation does not individually target religions that find same sex marriages unacceptable.

Petitioners further claim a "hybrid rights" cause of action, drawing on dicta in *Smith*, 494 U.S. at 881-82. As noted *supra*, petitioners claim of a free speech violation here is a legal sleight of hand made necessary by the absence of an applicable state RFRA. Petitioners' true claim here is one based on free exercise, not on any invented free speech claim. As respondents and other amici have convincingly argued, the hybrid rights concept suggested in *Smith* does not apply here. If it were to be applied here, it would permit any religious freedom claim to avoid the clear holding of *Smith* that the Constitution requires no religious exemption from a neutral law of general applicability. 494 U.S. at 882. This could not be the intention of this Court.

II. PETITIONERS' RELIGIOUS BELIEFS DO NOT PERMIT AN EXEMPTION FROM CIVIL RIGHTS LAWS

A. The harm caused by such an exemption is broad and impossible to repair

Even if this Court determines that *Smith* does not control, and either that petitioners have a colorable free speech claim, that CADA is not a law of neutral applicability, or that some novel "hybrid rights" claim applies, petitioners have failed to demonstrate that their rights have been violated. Colorado's interest in protecting its residents from discrimination based upon sexual orientation – by businesses – is a compelling one. The method chosen, the prohibition of for-profit businesses such as Masterpiece Cakeshop from discriminating against potential customers is

narrowly tailored to achieve that interest. *E.g. Grutter v. Bollinger*, 539 U.S. 306, 343 (2003). Petitioners seek to downplay the harm caused by their discrimination, while at the same time portraying themselves as the victims in this case, allegedly victimized by being compelled to abandon their deeply held religious beliefs.[11] They glibly suggest that because other bakers will provide cakes for same sex couples seeking to celebrate their marriages, and because in this particular case Craig and Mullins found such a baker, no real harm was done by their refusal. However, the true harm caused by petitioners' desired course of action is the stripping of dignity from people discriminated against because of their sexual orientation. Short of a ban on such discrimination by for-profit businesses such as Masterpiece Cakeshop, such harm cannot be effectively prevented.

LGBT Americans have always been subject to discrimination. This discrimination has taken the form of both legal restrictions and private prejudice. In recent years, however, legislatures and courts across the country have begun to recognize the harm caused by such discrimination, and have taken steps to require equal treatment based on sexual orientation. Allowing individual businesses such as Masterpiece Cakeshop to determine whether they will treat LGBT customers equally, and granting them a

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[11] As demonstrated *infra*, petitioners are not compelled to undertake any action contrary to their religious beliefs. Colorado does not seek to compel all residents, or indeed, all bakers, to design and bake wedding cakes for same sex marriages. It simply requires that if a for-profit business decides to sell wedding cakes, it must offer those cakes to all, regardless of the baker's personal preferences regarding marriages which are interracial, interfaith, or same sex.

right based on their religious beliefs to essentially have a sign that reads "no homosexuals allowed," would reverse the progress made over the last two decades towards equal treatment for the LGBT community, sending a message that they are not fully equal regardless of protections that they may have won from the state or federal governments.

This Court has led the movement towards recognizing the important dignity interest of LGBT Americans in being able to fully participate in society. In 1992, Colorado passed an amendment to its constitution prohibiting state and local governments from enacting any protections against discrimination based on sexual orientation. This Court found that such a law violates the federal Constitution, in that it excludes LGBT individuals from protections other residents of Colorado could enjoy. *Romer v. Evans*, 517 U.S. 620, 631 (1996) ("Homosexuals are forbidden the safeguards others enjoy or may seek without constraint.") The law excluded LGBT individuals from "protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." *Id.* While this Court recognized that the rationale advanced by Colorado for the amendment was "the liberties of landlords or employers who have a personal or religious objection to homosexuality," *id.* at 634, the amendment "seem[ed] inexplicable by anything but animus toward the class it affects." *Id.* at 632.

Seven years later, this Court addressed the constitutionality of laws which criminalized sexual activity between same sex couples. At that time, fourteen states, including Texas, imposed criminal penalties on consensual intercourse between same sex partners. In *Lawrence v. Texas*, 539 U.S. 558, 578 (2003), these

laws were struck down, and held to violate the Due Process Clause of the Fourteenth Amendment. Once again, this Court emphasized the fundamental dignity interests of gays and lesbians that were at stake. Denying consenting adults the right to engage in sexual intimacy denies them their full place in society. *Id.* at 567 ("It suffices for us to acknowledge that adults may choose to enter into this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.") This Court emphasized that individual religious preferences were not sufficient to deny this dignity right. *Id.* at 577-78 (*citing Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting) "[T]he fact that the governing majority in a State has traditionally viewed a practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.")

As the twenty-first century progressed, more states began to protect their citizens from discrimination based on sexual orientation. In 2004, Massachusetts became the first state to recognize same sex marriages, following a decision by its Supreme Court in *Goodridge v. Department of Public Health*, 798 N.E. 2d 941 (Mass. 2003). Other states followed. Then there was a backlash. States amended their constitutions to specifically prohibit such marriages,[12] and the federal government enacted the Defense of Marriage Act, 1 U.S.C.S. § 7, ("DOMA"), prohibiting federal recognition of same sex marriages despite their being legal in individual states. This Court, in *United States v. Windsor*, 133 S. Ct. 2675, 2695-96 (2013) found DOMA

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[12] *See, e.g.* Michigan State Proposal 04-02 (2004).

to be unconstitutional to the extent that it denied federal benefits to same sex couples legally married in their states. This decision again focused on the dignity of the couples concerned, and their rights to fully participate in society. *Id.* at 2694 ("Responsibilities, as well as rights, enhance the dignity and integrity of the person.") By denying federal benefits to married same sex couples, the law:

> "place[d] same sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects . . . and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children [] being raised by same-sex couples. The law in question [made] it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Id.*

It was the removal of the dignity of same sex couples and their families that made the law unconstitutional. *Id.* at 2695 ("[T]he principal purpose and the necessary effect of the law are to demean those persons who are in a lawful same-sex marriage.")

Most recently, this Court ruled that state laws prohibiting same sex marriage were unconstitutional. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607-08 (2015). This Court emphasized the important nature of marriage's symbolic status in society. *Id.* at 2594 ("Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations."); *id.* at 2601 ("[M]arriage is a keystone of our social order.") The right to choose a partner to marry

is one which is central to an individual's dignity. *Id.* at 2599 ("A first premise of the Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy.") When the state denied same sex couples the right to marry, they harmed not only the couple, but also their families, and in particular their children. *Id.* at 2600-01 ("The marriage laws at issue here thus harm and humiliate the children of same-sex couples.")

As Justice Kennedy noted in his confirmation hearing before the Senate in 1988, human dignity is a fundamental constituent of the liberty protected by the Constitution.

> "A very abbreviated list of the considerations [determining what is protected by liberty] are: the essentials of human dignity, the injury to the person, the harm to the person, the anguish to the person, the inability of the person to manifest his or her own personality, the inability of a person to obtain his or her own self-fulfillment, the inability of a person to reach his or her own potential."[13]

It is this dignity for LGBT Coloradans which is at stake here, and this dignity which stands to be irrevocably harmed by granting religious-based exemptions to for-profit businesses such as Masterpiece Cakeshop. The harm is not that Craig and Mullins could not obtain a cake from their first choice of a baker, which was Phillips, but instead that they had

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[13] Liz Halloran, *Explaining Justice Kennedy: The Dignity Factor*, The Two-Way, (June 28, 2013), http://www.npr.org/sections/thetwo-way/2013/06/27/196280855/explaining-justice-kennedy-the-dignity-factor.

to go to another bakery. The harm is that they were denigrated by petitioners and denied their status as full participants in society. Permitting businesses to choose who they will refuse to serve allows them to decide which groups do not deserve the full right to participate in society. This not only harms the same sex couples who are refused service, but, as noted by this Court, their families and children too. *Obergefell*, 135 S. Ct. at 2600-01. The preservation of such dignity, central as it is to the notion of liberty as protected by the federal Constitution, is a compelling interest for government at any level.

Petitioners' attempt to narrow the interests of the government in preventing this harm relies on misapplications of case law. Petitioners focus on two cases – *Hurley v. Irish American Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557 (1995), and *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). In *Hurley*, this Court ruled that "private citizens who organize a parade" could not constitutionally be required "to include among the marchers a group imparting a message the organizers do not wish to convey." 515 U.S. at 559. Similarly, in *Dale*, the Boy Scouts, "a private, not-for-profit organization engaged in instilling its system of values in young people" were held not to be required to admit an adult member who was a gay man as this would "violate[] the Boy Scouts' right of expressive association." 530 U.S. at 644. Amici note that at the time of both of these decisions, same sex intimacy could be criminalized in the United States, and was in fact illegal in many jurisdictions. Same sex marriages were prohibited throughout the country. This Court faced a very different landscape when these cases were decided. However, even if this

Court would rule the same today,[14] petitioners ignore the fundamental distinction that makes these cases inapplicable.

Masterpiece Cakeshop is a for-profit business, existing to generate income for Phillips, one of its owners. Unlike the Boy Scouts of America, and the organizers of the St. Patrick's Day parade in Boston, petitioners have chosen to place themselves into the stream of commerce, and to profit from their activities. The parade and the Boy Scouts have far greater connections to any alleged message that is sent by participation than for-profit businesses can claim regarding how their customers choose to use their products. The harm to those excluded is significantly different in this case. By seeking the right to, effectively, hang a sign on their door announcing "No LGBT People Will Be Served," petitioners send a clear and unmistakable message – that the right of LGBT Coloradans to equally participate in commerce is subordinate to the religious-based rights of businesses to exclude them. It creates the specter of a Balkanized America, where Main Street businesses are permitted to exclude whichever group they choose. The harm to African Americans from racial discrimination was not solely the inability to choose a particular barbecue restaurant, *e.g. Katzenbach v. McClung*, 379 U.S. 294 (1964), or a specific hotel. *E.g. Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964). If that were the case, then "separate but equal" lunch counters, water fountains, and schools would be constitutionally tolerable. *E.g. Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (ruling "separate but equal" to be unconstitutional in education). But the exclusion of a group from all or part of

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[14] Amici maintain both cases were incorrectly decided at the time.

commerce, based solely on the religious preferences of a given business, cuts much deeper than a simple reduction of options available to the discriminated-against group. As shown above, it sends a message of second-class status, stripping that group of its dignity.

Petitioners also maintain that CADA is not narrowly tailored. Again, this relies on the same misinterpretation of precedent, and downplaying of the harm caused, which lead petitioners to assert that the state's interest is not compelling. Petitioners claim that the harm caused by requiring a baker to at least know what the design of the cake would be before refusing service, allegedly based on the message that cake would send, "would likely be greater because the couple would be forced to discuss the details of their desired custom cake."[15] (Brief of Petitioners at 56-57). This presumes the harm involved is based on not being able to obtain one's first choice of baker. The real harm, though, is systemic. It comes from being told that a business will not serve you because of an innate characteristic you possess. Further harm derives from being told that even if the government has determined such discrimination is illegal, the personal religious preferences of the owner of that for-profit business outweigh your dignity.

When seen in this fashion, it is clear that the Colorado Anti-Discrimination Act is narrowly targeted. Exemptions, which result in individual for-profit businesses' being permitted to exclude individuals based on their sexual orientation (or based on other

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[15] This appears to amici to be completely unjustified, and based on the experiences of individuals who have never faced systemic discrimination. It unjustly presumes that hearing "I am sorry, I can't make that particular cake" is worse than being told "I won't serve you. Your type is not welcome here."

innate characteristics, *see infra* II b), would critically undermine the purpose of the law. The harm done to Craig and Mullins was not that they could not purchase a particular cake, it was that a particular cake baker considered himself to be above the law, and denied them service.[16]

B. Granting such exemptions fatally undermines all anti-discrimination legislation

While this case concerns a refusal to serve a particular couple a cake for a particular wedding reception, its impact will be much broader. The states and the federal government have implemented a series of protections for groups suffering from discrimination in this country, and there is nothing in the logic of petitioners' argument that restricts its applicability only to weddings, or only to discrimination against the LGBT community. As a society, we have decided that we will not permit for-profit businesses to refuse service to people based on factors including their race, their viewpoint on matters of religion, their national origin, and their gender. Our country has moved very

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[16] Petitioners are not aided by this Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). There this Court (in a decision amici continue to maintain was erroneous), granted a religious based exemption to a law of general applicability to a for-profit corporation. However, not only was that case decided under RFRA, but the rationale for this Court in determining that the contraceptive mandate was not the least restrictive means possible of achieving the government's interest was the ability of the government, itself, to supply no co-payment contraception to the employees who would lose such access. *Id.* at 2780-81. No such possibility for government action exists here. If an exemption is granted, the harm to LGBT people cannot be avoided; nor can it be cured after the fact.

far from racially segregated tram cars, *Plessy v. Ferguson*, 163 U.S. 537 (1896), and signs in windows reading "No Irish Need Apply." Petitioners seek to move us backwards, to return us to the days when anyone could openly discriminate for any arbitrary reason.

It is important to notice that much prejudice against people of different races in the United States was justified on religious grounds, and racists often still base their bigotry on their religious faith. In *Loving v. Virginia*, 388 U.S. 1, 3 (1967), this Court, in striking down laws prohibiting interracial marriages, unfavorably quoted the rationale of the lower court, which pronounced:

> "Almighty God created the races white, black, yellow, malay and red, and he placed them on several continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix."

Similarly, when Bob Jones University sought to justify its racially discriminatory policies, it based them on the University's religious beliefs and traditions. *Bob Jones University v. United States*, 461 U.S. 574, 580 (1983) ("The sponsors of the University genuinely believe that the Bible forbids interracial dating and marriage.") In neither instance was religious belief permitted to prevent government action to promote racial equality.[17]

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[17] We can be sure that following *Katzenbach*, 379 U.S. 294, and *Heart of Atlanta*, 379 U.S. 241, this Court would not have permitted individual restaurant owners to exclude African American patrons, based on the owners' religious preferences.

We cannot allow religious preferences and beliefs to be considered sufficient for petitioners to receive an exemption from neutral laws of general applicability such as CADA. Otherwise, similar exemptions based on religious faith would be available to all businesses who seek to avoid complying with any anti-discrimination law. A university could no longer be denied tax exempt status for racially discriminating against students, provided that the discrimination was asserted to be based on religious belief. *Bob Jones University*, 461 U.S. at 605. An accounting firm could refuse to promote a woman whose appearance did not fit what the firm's partners felt was appropriate for women, provided that the stereotypical view of how a woman should look was grounded in religion. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989). A clothing store could refuse employment to an applicant who wore a headscarf, but only if their opposition to headscarves was based on a religious belief system, as opposed to an aesthetic preference. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033-34 (2015).

All anti-discrimination laws would be subject to religious exceptions granted to for-profit businesses. It would not be sufficient for petitioners to claim that the government's interest in preventing discrimination against racial minorities, women, the disabled, or religious viewpoint groups is more compelling than its interest in defending people against discrimination based on their sexual orientation.[18] Petitioners' theory of harm recognizes only the damage caused to LGBT

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[18] Colorado, by including sexual orientation as a protected class under state law, and by repeated decisions to withhold religious exemptions by not passing a state RFRA, has made it clear that it believes such an interest is compelling.

individuals by being unable to receive service from a particular business, and minimizes even that harm. Such a theory would be equally dismissive of the harm to a Sikh American refused service in a particular restaurant because of his turban and beard, who then is served at a restaurant a block down the street, or to an African American refused a room at an airport hotel who is compelled to cross the parking lot and stay at a less racist hotel. The true harm comes from being the victim of bigotry, and not necessarily from the inconvenience of seeking alternative providers. The result of petitioners' position would be an America where business owners across the board would be free to refuse service to any customer from any group, provided that the basis of the refusal could be asserted as part of a religious belief. This is a society very different from the one which our anti-discrimination laws have sought to achieve.

C. Religious-based exemptions from anti-discrimination laws violate the Establishment Clause

It has long been held that religious claims of free exercise do not automatically justify an exemption to a law which everyone must otherwise obey. It is axiomatic that "[n]ot all burdens on religion are unconstitutional." *United States v. Lee*, 455 U.S. 252, 257 (1981). While there is "an absolute prohibition against government regulation of religious belief," *Bob Jones Univ.*, 461 U.S. at 603, the same is not the case when it comes to religiously motivated conduct. *Id.* ("On occasion this Court has found certain governmental interests so compelling as to allow even regulations prohibiting religiously based conduct."); *see also Braunfeld v. Brown*, 366 U.S. 599, 603 (1961). ("However, the freedom to act, even when the action is

in accord with one's religious convictions, is not totally free from legislative restrictions.")

Government can, and has, required individuals to act in a fashion contrary to personal religious beliefs, or to refrain from acting where such actions are demanded by religious faith. Despite polygamy's being arguably required by Mormonism at the time, a ban on polygamy in Utah was held to be constitutional. *Reynolds v. United States*, 98 U.S. 145, 166 (1878). Religious universities wishing to impose racial segregation and bans on interracial dating, based on their faith, were denied tax exemptions. *Bob Jones Univ.*, 461 U.S. at 603-04. The situation has been even clearer when it comes to for-profit businesses. Amish owners of businesses hold a religious based objection to Social Security, yet this Court has ruled that this does not exempt them from contributions on behalf of their employees who may not share those beliefs. *Lee*, 455 U.S. at 254. Petitioners acknowledge that they could continue in business without violating their religious beliefs by simply ceasing to produce wedding cakes and focusing on other baked goods. They maintain this is unfair as it would reduce their income by 40% (Brief of Petitioners at 28). Such concerns have not altered this Court's rulings. *Bob Jones Univ.*, 461 U.S. at 603-04 ("Denial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets."); *Braunfeld*, 366 U.S. at 605-06 ("Fully recognizing that the alternatives open to appellants . . . may well involve some financial sacrifice in order to observe their religious beliefs.")

Where an individual or a business entity seeks an exemption from a law of general applicability, based

on religious grounds, whether under RFRA, or, as here, based on free speech and free exercise, no such exemption can be permitted if it would violate the Establishment Clause.[19] In this case, the exemption sought by petitioners, the right to refuse service to individuals based on their sexual orientation, imposes an unmistakable burden on a third party – in this case Craig and Mullins. However, in a more general sense, all LGBT Americans and their families are denied the dignity of equal participation in society.

When this Court has faced constitutional claims seeking religious exemptions which would impose such a burden on a third party, it has rejected those claims. For example, a Connecticut law requiring businesses to honor requests from their employees not to work on their Sabbath day was struck down as a violation of the Establishment Clause because it "took no account of the convenience or interests of the employer *or those of other employees who do not observe a Sabbath*." *Est. of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709 (1985) (emphasis added). Similarly, a Sabbatarian airline employee was not entitled to a change in his shift structure to accommodate his religious preference for Saturdays off work, as granting that request would "deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath." *T.W.A. v. Hardison*, 432 U.S. 63, 81 (1977). Similarly, in *Lee*, the justification given for refusing an exemption from payment of social security contributions for the employees of the Amish complainant was

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[19] Amici believe all religious exemptions violate the Establishment Clause. However, for the purposes of this brief, amici focus on the unconstitutionality of religious exemptions which impose burdens on third parties. *Supra* n.2.

that such an exemption would harm the interests of the employees who should be able to make their own choice as to the moral implications of involvement in the program. 455 U.S. at 261 ("An exemption would "operate[] to impose the employer's religious faith on the employees.")

By granting the exemption sought here, then, this Court would be alleviating an alleged burden on Phillips' religious faith, permitting the for-profit corporation he owns to practice discrimination against LGBT customers. By doing so, it would transfer the burden to third parties, the LGBT Americans denied service. To so transfer this burden violates the Establishment Clause, by privileging Phillips' religious beliefs over and above the damage caused to the third party victims of discrimination. This Court has ruled that the Establishment Clause "mandates government neutrality between religion and religion, and between religion and non-religion." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). Giving automatic priority to Phillips' desire to exclude members of the LGBT community from his custom design cake business, over the harm inflicted on this group, solely because Phillips' claim originates in religion, is a clear breach of the "neutrality . . . between religion and non-religion." *Id.* It cuts to the very heart of the Establishment Clause.

When such exemptions have been granted, they have been legislative, not constitutional, and have wrongfully arisen under RFRA. The most notable situation, that of *Hobby Lobby*, granted an exemption to a closely-held for-profit corporation from a requirement that it provide insurance to its employees, including zero co-payment coverage of all FDA approved methods of contraception. 134 S. Ct. at 2759-60.

In granting such an exemption, erroneously in the opinion of amici, this Court stressed that the government could act to avoid the burden on the third parties who were losing their insurance, by providing the coverage. *Id.* at 2780-81. Here, there is no such possibility for government to step in and rectify the burden on third parties. No government action can restore dignity to those who face the harm of being refused service by a for-profit business, for no reason other than an inherent characteristic, whether that be race, gender, or sexual orientation.

In the absence of such an option for government action that would avoid harm to third parties, granting such exemptions to petitioners would allow overt discrimination against members of the LGBT community for no reason other than to provide special privileges to those who ground their discrimination in religious belief. This preference for religion violates the Establishment Clause.[20]

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[20] A preference for religion is inherent in RFRA, and forms the basis for amici's claims that such a law is unconstitutional on its face. As Justice Stevens noted in his concurrence in *City of Boerne*, "Whether the Church would actually prevail under the statute or not, the statute has provided the Church with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment." 521 U.S. at 537 (Stevens, J. Concurring)

CONCLUSION

For the above reasons, amici respectfully request this Court to affirm the judgment of the Colorado Court of Appeals.

Respectfully submitted,

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